Supreme Court U.S.

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No.

IN THE

Supreme Court of the United States

RANDALL J. LYNN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

PETER J. STRIANSE
Counsel of Record
TUNE, ENTREKIN & WHITE, P.C.
Attorneys for Petitioner
First American Center
21st Floor
Nashville, Tennessee 37238
(615) 244-2770

152894

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

4788

QUESTIONS PRESENTED FOR REVIEW

I. Whether a factually unwarranted deliberate ignorance jury instruction violates a criminal defendant's fundamental right to a fair trial?

II. Whether the government's outrageous conduct in concealing the criminal nature of a civil tax audit violates a criminal defendant's due process rights?

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Petitioner Randall J. Lynn respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. (App. A). The Judgment In A Criminal Case entered by the district court is attached. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on February 19, 1999. The Court of Appeals denied a timely petition for rehearing and for rehearing *en banc* April 9, 1999. (App. C). This petition for writ of certiorari was filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Sometime in 1980, Petitioner Randall J. Lynn (hereafter "Petitioner" or "Mr. Lynn") had the opportunity to become involved in the amusement machine business. Around 1985,

Mr. Lynn began to operate a company called R & B Amusement, which supplied jukeboxes, pool tables and video games to bars, restaurants, small stores and entertainment centers (this company was later renamed RANCO). In essence, RANCO provided games, and service on those games, to entertainment establishments in return for a 50/50 spilt of all money spent on the machines. Included within the games provided by RANCO were various types of "video poker machines." These machines made up less than 10 percent of RANCO's inventory. RANCO was a legitimate business. Mr. Lynn registered his business with county and state authorities, ran advertisements in the Yellow Pages, hired a law firm to handle accounting functions, paid federal employee tax, and never made any effort to hide the nature of his business.

When Mr. Lynn first began operating RANCO, a police captain in Chattanooga was also heavily involved in the amusement machine business and he also employed a 50/50 split method of generating revenue. In 1988, Mr. Lynn, along with several other operators of amusement games (including "video poker machines"), had an occasion to meet with Bradley County, Tennessee, Sheriff Dan Gilley, the highest ranking law enforcement officer of the county where Mr. Lynn and RANCO operated. At this meeting, the Sheriff told those present that he did not have a problem with their businesses. Mr. Lynn also saw the Sheriff on several occasions when he visited a competitor's business where there were "video poker machines" lined up against the wall. Mr. Lynn also employed an individual as a route man who was on "work release" from a local jail. Due to the nature of work release, a prison official visited RANCO to verify the type of work performed, and Mr. Lynn fully disclosed the nature of the business to the official. No prison

or state official ever objected to the arrangement. Also, over a 12 year span (from 1982 to 1994), Petitioner Lynn knew of no action by police against owners/vendors of video poker machines.

In April of 1991, Mr. Lynn submitted to a complete and thorough audit by the IRS which lasted over 30 months. During the course of the protracted IRS audit, Mr. Lynn revealed the nature of his business, his method of income (including the 50/50 split he shared with individuals who leased the poker machines), and his number of employees. An employee of Mr. Lynn testified that he was directed by Mr. Lynn to cooperate fully with the IRS and simply "tell the truth." An IRS agent visited Mr. Lynn's business and "left no stone unturned."

In March of 1994, Sheriff Gilley, despite his history of inaction against "poker machines," sent out a letter concerning the amusement games. On July 23, 1996, the federal government indicted Mr. Lynn. The indictment charged Mr. Lynn with knowingly and willfully conducting an illegal gambling business (Count One, 18 U.S.C. § 1955 and 18 U.S.C. § 2), knowingly conducting financial transactions (involving the proceeds of the illegal gambling business) with the intent of promoting the illegal gambling business (Counts Two through Forty-Six, 18 U.S.C. § 1956(a)(1)(A)(I) and 18 U.S.C. § 2), and knowingly conducting financial transactions (involving the proceeds of an illegal gambling business) designed to conceal the nature of the proceeds from the illegal gambling business (Counts Forty-Seven through Eighty-One, 18 U.S.C. § 1956(a)(1)(b)(I) and 18 U.S.C. § 2). Count Eighty-Two charged that all property involved in the charged felony offenses was subject to forfeiture.

Mr. Lynn's jury trial commenced on February 18, 1997 before the Honorable R. Allan Edgar, United States District Judge. On February 24, 1997, the jury returned a verdict of guilty as to Counts One through Eighty-One. However, the government dismissed Count 82 following a jury dead-lock on the forfeiture issue and a mistrial on that count. On June 2, 1997, Judge Edgar sentenced Mr. Lynn to the custody of the Federal Bureau of Prisons for a term of 67 months and a fine in the amount of $25,000. Mr. Lynn filed a timely notice of appeal on June 5, 1997 challenging his conviction and the sentence imposed by the district court. The Court of Appeals affirmed the district court.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED TO RESOLVE A SPLIT AMONG THE CIRCUITS CONCERNING AN IMPORTANT CONSTITUTIONAL QUESTION.

Although the Sixth Circuit has expressly condoned the use of a "deliberate ignorance" jury instruction,[1] there is clearly a disagreement among the circuits as to its propriety. The use of a "deliberate ignorance" or "conscious avoidance" jury instruction has been strongly disapproved of by the Fifth, Eighth, Ninth, and Eleventh Circuits. *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992); *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992); *United States v. Murrieta-Berjarano*, 552 F.2d 1323,

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1. *United States v. Lee*, 991 F.2d 343 (6th Cir. 1993); Sixth Circuit Jury Instruction 2.09.

1325 (9th Cir. 1955); *United States v. Stone*, 9 F.3d 934 (11th Cir. 1993). These appellate courts have found error in the giving of such instruction in part because of the substantial danger that jurors will misunderstand and be confused by the instruction and will incorrectly apply a negligence, recklessness, or "stupidity" standard. *United States v. Cartwright*, 6 F.3d 301 (5th Cir. 1993).

In circuits where the instruction has been approved, the appellate courts agree that an adequate factual predicate must be established at trial to support the issuance of a "deliberate ignorance" charge to the jury.[2] The "deliberate

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2. *United States v. Civelli*, 883 F.2d 191 (2nd Cir. 1989) (court held that an adequate factual predicate for the issuance of a conscious avoidance charge had been established at trial where the surrounding circumstances were such that, in the opinion of the court, a reasonable person could have concluded that the defendant, who was charged with violation of narcotics laws, would have been apprised of the unlawful nature of his conduct); *United States v. Caminos*, 770 F.2d 361 (3rd Cir. 1985) (trial record warranted the issuance of a conscious avoidance charge to the jury where the disproportionate amount of money spent by the defendant and his compatriots, who were charged with violation of drug or narcotics laws, to effectuate a simple importation of inexpensive wood carvings would have alerted the defendant, had he not ignored the probability, that something other than the wood carving was involved); *United States v. Abbas*, 74 F.3d 506 (4th Cir. 1996) (jury was properly instructed on willful blindness; defendant asserted lack of knowledge that charged transaction involved heroin, and witnesses stated that defendant knew suitcase contained heroin and that he had actively participated in transaction and negotiations and discussed future transactions); *United States v. Herrero*, 893 F.2d 1512 (7th Cir. 1990) (an adequate factual predicate was presented to justify the presentation to the jury of a conscious avoidance instruction as regarded its deliberation over

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ignorance" charge is appropriate where evidence shows the defendant attempted to escape conviction "by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." *United States v. Gullett*, 713 F.2d 1203, 1212 (6th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). Such an instruction is warranted only when evidence shows "the defendant consciously attempted to escape confirmation of conditions or events he strongly suspected to exist." *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990). The instruction should be used with caution, however, because of the possibility that "juries will convict on a basis akin to a standard of negligence: that the defendant should have known that the conduct was illegal." *United States v. Rivera*, 926 F.2d 1564, 1571 (11th Cir. 1991). The "deliberate ignorance" instruction is "rarely appropriate, however, because it is a rare occasion when

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the defendant's involvement in narcotics trafficking where the following evidence had been introduced at trial: the defendant admitted that he had participated in criminal drug transactions and that he was associated with the drug conspiracy group; the defendant drove around the country in vehicles loaded with cocaine and with cocaine sales proceeds; and the defendant denied knowledge of the group's illegal activities); *United States v. Ochoa-Fabian*, 935 F.2d 1139 (10th Cir. 1991) (trial court had properly given deliberate ignorance instructions, where: (1) the defendant was stopped at the U.S. border driving a pickup truck with a camper shell, along with two passengers; (2) the border agent detected a strong odor of perfume or deodorant which he believed was used to mask the odor of marijuana; (3) the defendant stated that he was going to California to look for work; (4) the bed of the pickup was freshly carpeted, containing only a spare tire and a six-pack of beer; (5) there was no luggage in the vehicle; and (6) one of the passengers did not have a permit to travel more than 25 miles from the border).

the prosecution can present evidence that the defendant deliberately avoided knowledge." *United States v. Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991). Thus, appellate courts have held that the instruction should be limited to situations where the evidence shows that: (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct. *Lara-Velasquez*, 919 F.2d at 951. The instruction is proper only where:

> sufficient independent evidence of deliberate avoidance of knowledge has been admitted. . . . [T]he same fact or facts cannot be used to prove both actual knowledge and deliberate indifference because the two are mutually exclusive concepts. If evidence proves the defendant actually knew an operant fact, the same evidence could not also prove he was ignorant of that fact. Logic simply defies that result.

Francisco-Lopez, 939 F.2d at 1410.

In the present case, there was no evidence which established actions of willful blindness or deliberate ignorance by Petitioner Lynn. He conceded that his conduct may have impacted State misdemeanor statutes but maintained that local law enforcement had led him to believe that the misdemeanor statutes were not being enforced in his part of the State. Because the government did not establish an adequate factual predicate at trial to support

the issuance of a "deliberate ignorance" charge, it was clear error for the district court to have given the instruction.[3]

"The danger in giving the instruction where there is evidence of direct knowledge but no evidence of avoidance of knowledge is that the jury could still convict a defendant who merely should have known about the criminal venture." *United States v. Manriquez Arbizo*, 833 F.2d 244, 249 (10th Cir. 1987). In addition, courts must studiously guard against the danger of shifting the burden to the defendant to prove his or her innocence. *See Murrieta-Bejarano*, 552 F.2d at 1325 ("The effect of a [deliberate ignorance] instruction in a case in which no facts point to deliberate ignorance may be to create a presumption of guilt."); *cf. Sandstrom v. Montana*, 442 U.S. 510, 521, 99 S. Ct. 2450, 2458, 61 L. Ed. 2d 39 (1979) (disapproving of jury instructions that contain presumptions which shift the burden of proof of an element of a crime to the defendant). By instructing the jury on "deliberate ignorance" when unwarranted by the underlying facts, the district court invaded the province of the jury, shifted the burden to Petitioner Lynn to prove his innocence and reduced the government's burden of proof to a mere negligence standard.

Moreover, an erroneous jury instruction is harmless only when the reviewing court can conclude that the erroneous presumption did not contribute to the jury's verdict. *Rose v. Clark*, 478 U.S. 570, 580-81, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (*citing Chapman v.*

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3. The giving of such an instruction robbed Petitioner Lynn of his good faith/entrapment by estoppel defense and was clear error.

California, 386 U.S. 18 (1967)).[4] Here, the erroneous presumption created by the factually unsupported

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4. *Compare United States v. Perez-Tosta*, 36 F.3d 1552, 1565 (11th Cir. 1994) (error in including deliberate ignorance instruction in absence of evidence showing deliberate ignorance harmless when jury could easily have found actual knowledge) *and United States v. Cicero*, 22 F.3d 1156, 1161-62 (D.C. Cir. 1994) (error in instruction about precision with which government would have to prove date of crime harmless when jury would have found same way) *with Yates v. Evatt*, 500 U.S. 391, 408-11 (1991) (reversal required when erroneous jury instructions may have contributed to guilty verdict); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 55 n.20 (1st Cir. 1991) (reversal required because jury instruction that proof that employee of hazardous waste disposal facility responsible corporate officer conclusively proved employee had knowledge of illegal acts erroneous and error not harmless beyond reasonable doubt); *United States v. Melendez*, 90 F.3d 18, 21-22 (2d Cir. 1996) (reversal of conviction for drug trafficking crime with thirty year enhancement for using or carrying machine gun required when jury instruction included too broad definition of "use" and impossible to determine whether verdict rested on legally sufficient theory); *Gilbert v. Moore*, 121 F.3d 144, 149 (4th Cir. 1997) (reversal required when jury instruction created rebuttable presumption of implied malice in capital murder trial); *United States v. Thomas*, 86 F.3d 647, 650-51 (7th Cir.) (reversal required when court erroneously instructed jury that "use" of firearm included providing person with security and confidence to commit crime because court not convinced properly instructed jury would have convicted), *cert. denied*, 117 S. Ct. 392 (1996); *United States v. Baumgardner*, 85 F.3d 1305, 1309-10 (8th Cir. 1996) (reversal required when erroneous jury instruction omitted materiality, thus removing essential element from jury's deliberation because not harmless beyond reasonable doubt); *United States v. Spring*, 80 F.3d 1450, 1466 (10th Cir.) (reversal required when jury instruction erroneously explained "carrying" element in prosecution for aiding and abetting in using or carrying

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"deliberate ignorance" instruction undoubtedly contributed to the jury's verdict.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION IN A MANNER THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioner submits that the Court of Appeals' decision is contrary to the letter and spirit of *United States v. Russell*, 411 U.S. 423 (1973); and *United States v. Powell*, 379 U.S. 48 (1964).

The Internal Revenue Service, acting through Civil Revenue Agent Scott Kennedy, improperly and in bad faith, used its civil investigatory powers to gather information for a criminal investigation of Petitioner Lynn in violation of his Fifth Amendment due process rights. Repeated denials of the existence of a criminal investigation throughout a thirty-month civil audit, combined with IRS documents,

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firearm during commission of bank robbery), *cert. denied*, 117 S. Ct. 385 (1996); *United States v. Ruiz*, 59 F.3d 1151, 1155 (11th Cir.) (reversal required when court erroneously denied instruction on mistake-of-fact defense when defense not covered by existing instruction and denial seriously impaired defense because not harmless beyond reasonable doubt), *cert. denied*, 116 S. Ct. 956 (1996) *and United States v. Rawlings*, 73 F.3d 1145, 1149 (D.C. Cir. 1996) (reversal required when instructions erroneously created hierarchy among offense elements because diverted jurors' focus from finding essential elements beyond reasonable doubt).

show that the IRS made false representations about the nature and scope of its inquiry into Petitioner Lynn's affairs that go to the heart of the government's criminal investigation. The investigative techniques used by the civil arm of the IRS were so outrageous that they offend the notion of fundamental fairness embedded in the Fifth Amendment's Due Process Clause. *See United States v. Russell*, 411 U.S. 423, 432 (1973). The indictment should have been dismissed based on the government misconduct which, in violating the Due Process Clause, is so offensive that it conflicts with any sense of justice. *See Russell*, 411 U.S. at 432; *United States v. Barger*, 931 F.2d 359, 361 (6th Cir. 1991); *United States v. Brown*, 635 F2d 1207, 1212 (6th Cir. 1980).[5]

It is well settled that the IRS may use its civil processes only for legitimate tax purposes. *United States v. Powell*, 379 U.S. 48, 57-58 (1964) (improper to issue civil summons to harass taxpayer, to force settlement of collateral issue or "for any other purpose reflecting on good faith of particular investigation"). Further, the IRS has the burden of demonstrating that its civil actions are motivated by valid tax concerns. *United States v. Genser*, 595 F.2d 146, 150 (3d Cir. 1979), *cert. denied*, 444 U.S. 928 (1979) (IRS must demonstrate a civil purpose for each audit). When determining whether an IRS inquiry is abusive, a court should focus on whether the investigation is motivated by

5. While Petitioner Lynn notes that the Sixth Circuit in a recent decision has declared the due process or outrageous government conduct defense as unavailable, the dissent (*See United States v. Tucker*, 28 F.3d 1420, 1426 (6th. Cir. 1994)) held that the decisions rendered in more than two dozen cases are more than mere dicta. They are clearly a recognition of a valid due process defense. This Court has clearly not held otherwise.

a legitimate tax purpose. *United States v. Zolin*, 809 F.2d 1411, 1416 (9th Cir. 1987).

The IRS must not only demonstrate a legitimate purpose for the investigation, but must also show they pursued that purpose in good faith. *See United States v. Abrahams*, 905 F.2d 1276, 1281 (9th Cir. 1990) (civil audit cannot be used as camouflage for an ulterior non-tax motive); *Zolin*, 809 F.2d at 1416 (purpose must be legitimate and in good faith rather than merely camouflage for an ulterior non-tax motive). The rationale behind the good faith standard is that its application prevents the IRS from becoming an information gathering agency for other governmental agencies. *See Zolin*, 809 F.2d at 1416; *United States v. Serubo*, 604 F.2d 807, 813 (3d Cir. 1979) (wrong for IRS to be used as information gathering agency for other departments).

It logically follows that the IRS may not use its civil audit process to develop or gather information for a parallel criminal investigation. *See United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993); *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977). Further, where the Service does cross the line and abuses its civil audit processes, it will be held to have violated the taxpayer's rights. *See Tweel*, 550 F.2d at 299.

In *Tweel*, the court applied this prohibition and held that an IRS agent's failure to apprise the defendant of the criminal nature of the investigation, constituted deliberate deception that should have resulted in suppression of the evidence at trial. *See id.* at 299. Having just completed an earlier civil audit, *Tweel* was again asked to cooperate in a second audit regarding review of his income tax returns for

1966-1968. *See id.* at 298. Although the first audit was civil in nature, the IRS had assigned a special agent to work on it. *See id.* Fearing that his client may be involved in a criminal inquiry, Tweel's accountant asked the IRS if a special agent had been assigned to the second audit as well. *See id.* The IRS informed the accountant that no special agent would be involved and implied that the audit was routine. *See id.* The IRS further misled Mr. Tweel and his accountant by failing to disclose that the audit was initiated at the request of the Department of Justice, Organized Crime and Racketeering Section. *See id.*

On these facts, the court concluded that the IRS had "grossly deceived" Tweel by misrepresenting the nature of the audit. *See Id.* at 299. The court further concluded that the misrepresentation was deliberate and "done in flagrant disregard of the defendant's rights." *Id. Tweel* supports the proposition that IRS misrepresentations regarding the nature of the investigation can effectively deprive taxpayers of their rights.

The IRS acknowledges the impropriety of this abuse of process in their own guidance manual, barring the use of civil audits for criminal purposes. *See Internal Revenue Manual*, § 9311.83 ("[T]he Service shall not attempt to use a civil examination to develop a criminal tax investigation."). Moreover, the case law is clear about the separation of civil and criminal investigations and when the IRS should begin and inform the party of a criminal investigation. *See United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993). *Grunewald* demarcates the point at which civil audits must be transferred for referral to criminal divisions: "[O]nce an IRS agent has developed firm indications of fraud in civil investigation, the case must be

turned over to the Criminal Investigation Division." *Id.* at 534. The court in *Gruenwald* illuminated the rationale behind this transfer: "[S]ignificantly different rights, responsibilities and expectations apply to civil audits and criminal tax investigations." *Id. Grunewald* states that an abuse of the civil process to gather evidence for criminal investigations "would be a flagrant disregard of individuals rights" and cautions against representations that deliberately deceive or lull taxpayers into incriminating themselves during an audit when activities of an obviously criminal nature are under investigation. *Id.*

Relying on the same rationale of differing rights and responsibilities for different investigations, where the IRS abuses its civil processes to develop criminal investigations, courts have found the IRS exceeded its civil powers. *See Menendez v. United States*, 872 F. Supp. 567, 571 (S.D. Ind. 1994) (IRS acts in bad faith when uses civil investigatory powers to gather evidence for criminal prosecution). *Menendez* indicates that courts will not allow the IRS to "exploit its civil investigatory powers as a de facto grand jury." *Id.*

Applying these decisions, it is clear that the IRS abused its civil audit process by using it to gather evidence for a criminal prosecution of Petitioner Lynn. Further, these investigatory procedures were so deceitful that they offend the notion of fundamental fairness embraced by the Due Process Clause. *See United States v. Russell*, 411 U.S. 423, 432 (1973); *United States v. Barger*, 931 F.2d 359, 363 (6th Cir. 1991).

The investigation into Petitioner Lynn's affairs began in April 1991, after he was informed by letter to contact

Civil Revenue Agent Scott Kennedy. The letter notified Petitioner Lynn that Kennedy had been assigned to conduct an audit of his federal income tax returns for the years 1989, 1990 and 1991. Throughout the course of the audit, Agent Kennedy had several meetings with Petitioner Lynn and his attorney, William Taylor. During the thirty-month civil audit, Petitioner Lynn was never informed of a parallel criminal investigation into his affairs. Both Petitioner Lynn and his attorney gave unchallenged testimony that Agent Kennedy denied the existence of a criminal investigation on several occasions. On one specific occasion, Mr. Taylor directly asked Agent Kennedy if there was "any kind of criminal investigation intended or in progress," to which Kennedy replied in the negative. In addition, Petitioner Lynn testified that in his presence, Kennedy had told Mr. Taylor that the investigation was "just an audit . . . no problem."

The circumstances surrounding Petitioner Lynn's subsequent criminal prosecution, along with documents uncovered later, clearly indicate the aforementioned statements were nothing but false reassurances and misrepresentations. As a result of a contested issue in the civil audit, Petitioner Lynn and his attorney, through the discovery process, received documents from his civil audit. These documents provided boxes for the examiner to check to indicate the type of investigation. In the boxes provided, the IRS checked the box indicating "criminal prosecution/ joint investigation." By its own documents, the IRS has proven that they misrepresented the nature of the audit, abusing it to uncover information for a criminal prosecution of Petitioner Lynn.

Once established, these documents, together with Agent Kennedy's misrepresentations, embody the type of outrageous investigative conduct prohibited by the fundamental notions of fairness embedded in the Due Process Clause. *See United States. v. Barger*, 931 F.2d 359, 363 (6th Cir. 1991) (fundamental fairness by Government in investigating crime is a core component of the Due Process Clause of the Fifth Amendment). Where the government disregards these notions, its conduct is measured to determine whether it is "shocking to the universal sense of justice." *United States v. Russell*, 411 U.S. 423, 432 (1973); *United States v. Brown*, 635 F.2d 1207, 1212 (1980). During the course of its investigation of Petitioner Lynn, the government repeatedly lied to him, even in the face of direct questioning, while simultaneously asking him to turn over incriminating documents and records that they knew would aid in criminal prosecution. By failing to disclose the nature of the investigation, the government let Petitioner Lynn continue to incriminate himself further without regard for his due process rights. This is by any account contrary to established notions of justice, where a defendant is fully aware of his rights. Because the investigation of the government is tainted by this deception and outrageous behavior, the indictment against Petitioner Lynn should have been dismissed.

CONCLUSION

For reasons stated herein, the Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

PETER J. STRIANSE
Counsel of Record
TUNE, ENTREKIN & WHITE, P.C.
Attorneys for Petitioner
First American Center
21st Floor
Nashville, Tennessee 37238
(615) 244-2770

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED FEBRUARY 19, 1999

No. 97-5682

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RANDALL J. LYNN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

OPINION

Before: DAUGHTREY and MOORE, Circuit Judges; COHN,* District Judge.

KAREN NELSON MOORE, Circuit Judge. Randall J. Lynn was convicted in the district court of running an illegal gambling business in violation of 18 U.S.C. § 1955

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* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

and of money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and (B)(i). On appeal Lynn argues, inter alia, that the Tennessee gambling statutes on which the federal gambling charge was predicated are unconstitutionally vague and that, with regard to the money laundering counts, the indictment failed to allege and the evidence failed to establish the requisite level of scienter. We conclude that these contentions and Lynn's other assignments of error are without merit, and we **AFFIRM** Lynn's conviction and sentence.

I

Lynn operated a business known as RANCO that fabricated and distributed video games and gambling machines. RANCO placed the machines in truck stops, markets, bars, and other small business establishments. The gambling machines consisted of electronic poker and slot machines, and successful players received cash payouts from the proprietor. The net profits generated by the machines were divided equally between the host establishments and Lynn. Lynn and/or RANCO acquired a number of general business and video game licenses, and, although most transactions involved cash, apparently little or no effort was made to conceal the nature of this business.

RANCO's operations were substantial. From 1991 through 1993 the IRS conducted a civil audit of RANCO which found unreported income of $439,345 for the tax years 1989 through 1991. A 1994 search of RANCO's offices conducted by federal authorities uncovered approximately $396,000 in cash.

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During the course of an undercover investigation conducted in 1993 by the Tennessee Bureau of Investigation, Lynn agreed to assist an agent, who was posing as a businessman, in setting up a tavern in exchange for the agent's agreement to install Lynn's gambling machines under the standard profit-sharing arrangement. Another undercover agent gambled on Lynn's machines in various establishments and routinely received cash payoffs when he won.

In 1996 Lynn was indicted in federal court on charges of operating an illegal gambling business in violation of 18 U.S.C. § 1955 and of laundering the proceeds in violation of 18 U.S.C. § 1956. An additional count charged that the property involved in the money laundering operation was subject to forfeiture. A jury convicted Lynn on the gambling and laundering counts but deadlocked on forfeiture. The forfeiture count subsequently was dismissed. Lynn filed a timely appeal challenging his conviction and the sentence imposed. Subsequently, Lynn filed a motion seeking to stay these proceedings pending the resolution of an appeal from a Tennessee trial court decision declaring unconstitutional the state gambling statutes that underpin Lynn's federal convictions.

The district court properly exercised jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

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II

Count One of the indictment charged Lynn with a violation of 18 U.S.C. § 1955, which makes it a federal crime to conduct certain gambling businesses in violation of state law. It was specifically charged that Lynn "did knowingly and willfully conduct, finance, manage, supervise, direct and own all or part of an illegal gambling business involving the fabrication and operation of gambling devices, including video poker machines and video slot machines, in violation of the laws of the State of Tennessee (Tennessee Code Annotated, Sections 39-17-501 to 505). . . ." J.A. at 11. Lynn argues that the Tennessee gambling provisions are unconstitutionally vague and, thus, that a conviction based upon the violation of these statutes violates due process. The district court rejected this argument pretrial. We review this question of law de novo. *See United States v. Levy*, 904 F.2d 1026, 1029 (6th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991).

Under the Tennessee statutes, "[a] person commits an offense who knowingly engages in gambling," TENN. CODE ANN. § 39-17-502, or who knowingly engages in certain gambling related activities. TENN. CODE ANN. §§ 39-17-503, 504. Gambling devices also are outlawed. TENN. CODE ANN. § 39-17-505. Among others, the statute provides the following definitions:

> (1) "Gambling" means risking anything of value for a profit whose return is to any degree contingent on chance, but does not include a lawful business transaction;

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* * *

> (3) "Gambling device or record" means anything designed for use in gambling, intended for use in gambling, or used for gambling;
>
> (4) "Lawful business transaction" as used in subdivision (1), includes any futures or commodities trading. . . .

TENN. CODE ANN. § 39-17-501. A comment to this section explains that the definitions are intentionally broad and are intended to reach "any scheme by which value is risked upon a chance for greater value. . . . The definition of 'gambling' includes lotteries, chain or pyramid clubs, numbers, pinball, poker or any as of yet unnamed scheme where value is risked for profit." TENN. CODE ANN. § 39-17-501, Sentencing Commission Comments.

This court recently has rejected an identical void-for-vagueness challenge to a § 1955 conviction predicated on violation of the Tennessee gambling statutes. *See United States v. Hill*, Nos. 97-6051/6286/6308/6309 (6th Cir. Feb. 17, 1999). There, we noted that in cases, such as this, in which constitutionally protected content is not threatened, the vagueness challenge fails if the defendant had fair notice that his conduct was proscribed by the relevant statutes. *See id.* at 11. As we discussed in *Hill*, the operation of video gambling machines clearly is proscribed under the Tennessee gambling statutes. *See id.* at 13. Accordingly,

we reject Lynn's due process challenge to his § 1955 conviction.[1]

Lynn also was convicted of money laundering pursuant to 18 U.S.C. §§ 1956(a)(1)(A)(i) and (B)(i).[2] At trial the

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1. Because we conclude that the Tennessee gambling provisions are not unconstitutionally vague as applied to Lynn's activities, we deny Lynn's motion seeking to stay this appeal pending the outcome of unrelated state court proceedings that may address the constitutionality of the statute. *See Hill*, slip op. at 8-9 (denying identical motion in identical circumstance). As we noted in *Hill*, Lynn is not precluded from seeking relief pursuant to 28 U.S.C. § 2255 should the Tennessee Supreme Court declare the state provisions unconstitutional.

2. Section 1956 provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (B) knowing that the transaction is designed in whole or in part —
>
> (i) to conceal or disguise the nature, the location, the source,

(Cont'd)

government showed that Lynn used illegally derived funds to purchase materials to manufacture additional gambling machines and that illegally derived funds were spent or deposited in such a manner as to conceal the nature, source, or ownership of the funds. Lynn argues, however, that § 1956(c)(1) requires the government to demonstrate that the defendant knew that the underlying activity was a felony in order to convict under the federal money laundering statute, and he asserts that the indictment failed to allege and that the evidence failed to prove that he knew that his gambling business constituted a felony. Lynn admits that he knew that his business operations were unlawful, but he claims that he thought that the operations constituted a misdemeanor and not a felony. In *Hill*, after considering

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(Cont'd)

> the ownership, or the control of the proceeds of specified unlawful activity; or
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> * * *
>
> shall be sentenced to a fine . . . or imprisonment.
>
> * * *
>
> (c) As used in this section —
>
> (1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law. . . .

the plain meaning of the statute, the legislative history, and the considered opinions of our sister circuits, we rejected the "knowledge-of-a-felony" interpretation of the § 1956(c)(1) scienter requirement argued by Lynn. *See Hill*, slip op. at 14-21. There,

> we conclude[d] that the government is not required to show that the defendant knew the precise nature of the unlawful activity; i.e., that he knew it was felonious as opposed to misdemeanor activity, as long as the government shows the defendant knew the money was from some form of unlawful activity and further shows that the unlawful activity at issue was in fact a felony. . . .

Id. at 17-18. Given this court's interpretation § 1956(c)(1), several of Lynn's assignments of error are readily resolved.

Counts Two through Eighty-two of the indictment charged Lynn with money laundering in violation of § 1956. The indictment tracks the language of § 1956 charging, inter alia, that the transactions "involved the proceeds of a specified unlawful activity" and that Lynn knew that the property involved "represented the proceeds of unlawful activity." J.A. at 12-18. Lynn's only complaint with the indictment is that it failed to allege that Lynn knew that the unlawful activity that generated the property amounted to a felony.

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a

defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). *Accord United States v. Paulino*, 935 F.2d 739, 750 (6th Cir. 1991), *cert. denied*, 502 U.S. 914, 917, 1014 (1991), *and cert. denied*, 502 U.S. 1036 (1992). Because Lynn's knowledge that the proceeds-generating activity constituted a felony is *not* an element of the § 1956 offense, the indictment adequately informed Lynn of the charges and was sufficient.

Similarly, Lynn's only complaint regarding the sufficiency of the evidence used to convict him on the money laundering counts is that no evidence was presented that Lynn knew of the felonious nature of the activities that generated the laundered property. Again, because this specific knowledge is not a required element of the offense, this contention fails.

Lynn next argues that the jury instructions were confusing and inadequate with regard to the scienter requirement. We review the district court's instructions to the jury to determine "whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury." *United States v. Martin*, 740 F.2d 1352, 1361 (6th Cir. 1984).

The district court provided the jury with the following instruction regarding scienter:

> Next I want to talk about the required mental state of the defendant. The indictment charges

> that the defendant committed the acts of money laundering "knowingly." As I've already explained, this means that the defendant must have known that the property involved was the proceeds of a felony under federal law, This means that the defendant Randall J. Lynn must have known that he was operating an illegal gambling business under 18 U.S.C. § 1955, which implies that he knew the activity of his business constituted illegal gambling under Tennessee law.

J.A. at 223. Earlier in the charge the judge had instructed the jury that to be convicted the defendant had to have known that the laundered property represented the proceeds of an illegal gambling business, and he instructed the jury that operating an illegal gambling business in violation of 18 U.S.C. § 1955 is a felony.

We think it likely that the jury inferred the proper scienter requirement from these instructions, that is, that Lynn must have known that his business activities were illegal in order to convict him of a violation of § 1956. If, however, the jury inferred a heightened scienter requirement, any error in the instructions was surely harmless. Obviously, if the jury believed that it must find, and did find, that Lynn knew that the crimes involved were felonious, the jury certainly determined that Lynn knew that the activities were unlawful. We conclude, therefore, that these instructions were adequate.

The district court also provided a general "willful blindness" instruction based on the Sixth Circuit pattern. Lynn complains that evidence of deliberate ignorance was insufficient to justify the use of this instruction. We disagree.

The willful blindness instruction is to "be used only when there is some evidence of deliberate ignorance." *United States v. Lee*, 991 F.2d 343, 350 n.2 (6th Cir. 1993). The evidence of deliberate ignorance relied upon by the district court in justifying the instruciton was drawn from Lynn's testimony at trial. Lynn testified that he or his machines had been the subject of law enforcement raids in 1989 and 1994, and that he assumed that wrongful use of the games was a misdemeanor, but that he did not try to find out the state of the law. The raids alone should have been sufficient to cause a reasonable businessman to determine the legality of his operations. Viewed in the light most favorable to the government, the evidence was sufficient to justify the use of the willful blindness instruction.[3]

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3. *United States v. Wuliger*, 981 F.2d 1497 (6th Cir. 1992), *cert. denied*, 510 U.S. 1191 (1994), cited by Lynn, is inapposite. There, the trial court failed properly "to instruct the jury that it had to find the defendant knew or had reason to know that [certain] recordings were made in violation of the" wiretapping statute in order to convict the defendant under that statute. *Id.* at 1503. The court rejected the government's argument that a willful blindness instruction given by the judge filled the gap created by the failure to charge scienter. *See id.* In the present case the willful blindness instruction supplements an adequate instruction on scienter.

The jury deadlocked on Count Eighty-two of the indictment, which provided for the forfeiture of property involved in Counts One through Eighty-one. Because the forfeiture count required only a finding by the preponderance of the evidence that the property was illegally derived, while the previous counts required proof beyond a reasonable doubt, Lynn argues that the jury must have been confused in order to convict on Counts One through Eighty-one and deadlock on Eighty-two. Contrary to Lynn's assertion, however, it is not certain that the jury was confused, and, in any event, inconsistent verdicts do not constitute grounds for reversal.

As the government points out, forfeiture is controversial. Moreover, legally and illegally derived funds were commingled in the present case. The illegally derived funds may have been spent, and the jury may have been sympathetic to Lynn's argument that legally derived funds should not be forfeited. In any event, because inconsistent verdicts are as easily attributable to lenity or mistake in favor of the defendant on one or more counts as they are to a mistaken conviction on other counts and because the government may not appeal an acquittal, it is well established that an inconsistent verdict is not grounds for reversal. *See United States v. Powell*, 469 U.S. 57, 64-65 (1984); *United States v. Silva*, 846 F.2d 352, 357-58 (6th Cir.), *cert. denied*, 488 U.S. 941 (1988).

Although Lynn put the government to its proof at trial, he argues that he admitted his involvement in the gambling business and that the district court's refusal to award a sentencing adjustment for acceptance of responsibility was

error. As an issue of fact, we review the trial court's determination regarding acceptance of responsibility for clear error. *See United States v. Downs*, 955 F.2d 397, 400 (6th Cir. 1992).

The Sentencing Guidelines commentary makes it clear that an adjustment for acceptance of responsibility is not precluded by a defendant's assertion of his constitutional right to trial. An adjustment in such a case is expected to be rare, however, and is conceivable primarily in a situation in which a defendant admits his factual guilt but goes to trial to test the constitutionality or applicability of a statute. *See* U.S. SENTENCING GUIDELINES MANUAL ("U.S.S.C.") § 3E1.1 commentary, applic. note 2.

Although Lynn tested the constitutionality of the statutes at trial, he also contested his factual guilt. For example, Lynn attempted to establish a lack of intent by testifying at trial that he did not know that his machines were being used for gambling. Similarly, Lynn never admitted to operating anything other than a legitimate business. The district court did not clearly err in refusing to award Lynn a sentencing adjustment for acceptance of responsibility.[4]

4. Lynn errs in contending that this court's decision in *United States v. Fleener*, 900 F.2d 914 (6th Cir. 1990), supports an adjustment in his case. The court in *Fleener* merely held that an adjustment was available and that the district judge did not commit clear error in granting an acceptance of responsibility adjustment in the case of a defendant who went to trial on an entrapment defense. *See id.* at 918. Here, there is no assertion that the district judge thought the adjustment was unavailable; he simply thought it unwarranted.

Lynn next argues that his case falls outside of the heartland of money laundering offenses and that the trial court erred in refusing to grant a downward sentencing departure. It is well established, however, that, unless the trial court believed it lacked the discretion to make a downward departure, the decision of the district court not to depart is unreviewable. *See* 18 U.S.C. § 3742(a); *United States v. Abdullah*, 162 F.3d 897, 905-06 (6th Cir. 1998). No assertion has been made in the present case that the district judge believed that he lacked the discretion to depart. The judge simply determined that this case was within the heartland of money laundering offenses. This determination is unreviewable.[5]

Lynn also argues that the government concealed the true nature of a civil IRS investigation into his business operations and that this concealment constitutes outrageous government conduct that violated his due process rights. The government asserts, and Lynn does not deny, that this claim was not raised in the trial court. The government also argues, and Lynn admits, that this court has rejected this defense in any event. *See United States v. Tucker*, 28 F.3d 1420, 1428 (6th Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995). There are no exceptional circumstances to compel this court to address this forfeited claim. *See Pinney Dock & Transp. Co. v. Penn. Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

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5. *United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991), cited by Lynn, is inapposite. There, the appellate court determined that the trial judge believed that he lacked the discretion to depart. *See id.* at 179.

Appendix A

III

For the foregoing reasons, we **AFFIRM** Lynn's conviction and sentence.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA DATED AND FILED JUNE 3, 1997

United States District Court
Eastern District of Tennessee at Chattanooga

UNITED STATES OF AMERICA

v.

Randall J. Lynn

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 1:96CR00071-001
Peter Strianse, (Retained Counsel)
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) **1,2-46, 47-79 and 81 of the Indictment.** after a plea of not guilty

Title & Section:	18 U.S.C. § 1955
Nature of Offense:	Aid and Abet and Operation of an Illegal Gambling Business
Date Offense Concluded:	04/01/1992
Count Number(s):	1

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Title & Section:	18 U.S.C. §1956(a)(1)(A)(i)
Nature of Offense:	Aid and Abet and Money Laundering w/Intent to Promote the Carrying On of Specified Unlawful Activity
Date Offense Concluded:	01/04/1994
Count Number(s):	2-46
Title & Section:	18 U.S.C. § 1956(a)(1)(B)(i)
Nature of Offense:	Money Laundering to Conceal the Proceeds of Specified Unlawful Activity
Date Offense Concluded:	02/01/1994
Count Number(s):	47-79
Title & Section:	18 U.S.C. § 1956(a)(1)(A)(i)
Nature of Offense:	Money Laundering to Conceal the Proceeds of Specified Unlawful Activity
Date Offense Concluded:	03/01/1994
Count Number(s):	81

The defendant is sentenced as provided through pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

☒ Count(s) 80 & 82 are dismissed on the motion of the United States.

Appendix B

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 408-94-3441

Defendant's Date of Birth: 11/07/1954

Defendant's USM No.: 15384-074

Defendant's Residence Address:
10804 Pine Hill Road
Mc Donald TN 37353

Defendant's Mailing Address:
10804 Pine Hill Road
McDonald TN 37353

06/02/1997
Date of Imposition of Judgment

s/ R. Allan Edgar
Signature of Judicial Officer

R. Allan Edgar
U.S. District Judge
Name & Title of Judicial Officer

June 3, 1997
Date

Appendix B

[stamp]
ATTEST: A true copy Certified
this JUN 03 1997
R. MURRY HAWKINS, CLERK
by s/ [illegible] Dep. Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **67 month(s).**

on each of counts 2-79 and 81, and 60 months on Count 1, all to be served concurrently.

* * *

☒ The defendant shall surrender to the United States Marshal for this district:

* * *

☒ as Notified by the United States Marshal.

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APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 9, 1999

97-5682

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RANDALL J. LYNN,

Defendant-Appellant.

ORDER

BEFORE: DAUGHTREY and MOORE, Circuit Judges; and COHN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix C

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

s/ Leonard Green
Leonard Green, Clerk